INDEX

Subject Index

	Page
Petition for writ of certiorari	1
Opinion	1
Jurisdiction	2
Question presented	2
Statutes involved	2
Statement	2
Reasons relied upon for allowance of the writ	3
The judgment is in conflict with judgments on the same question in other circuits	3
The judgment below is in conflict with the decisions of this Court dealing with this subject matter	6
The far-reaching implications of the carry-back provisions of the Internal Revenue Code require further consideration by this Court	7
Conclusion	8
Appendix—Bankruptcy Act, Section 110 (a)	9
Internal Revenue Code, Section 48(a)	9
Internal Revenue Code, Section 122(b) (1)	10

Table of Cases Cited

Erwin v. *United States*, 97 U.S. 392	6
Lockhart v. *Mittleman*, 123 F. (2d) 703	4
Manning v. *Seeley Tube and Box Company of New Jersey*, 338 U.S. 561	7
Reo Motors, Inc. v. *CIR*, 338 U.S. 442	7
Tennessee Valley Authority v. *Kinzer*, 142 F. (2d) 833	4
Williams v. *Heard*, 140 U.S. 529	6

Statutes and Other Authorities Cited

Current Tax Payment Act of 1943	5
Internal Revenue Code, Section 122	5, 7
Judicial Code, Section 240 (a)	2

United States Code Annotated:

Title 11:

	Page
Section 110(a)(5)(6)	2, 9

Title 26:

Section 48(a)	2, 9
Section 122(b)(1)	2, 9

Title 28:

Section 347	2

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 325

DAISYE B. WOOTON, ET AL.,

Petitioners,

vs.

G. M. McWILLIAMS, TRUSTEE IN BANKRUPTCY FOR F. T. NEWTON AND MRS. ETHEL FLUBY NEWTON, BANKRUPTS,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Petitioners pray that a writ of certiorari issue to the United States Court of Appeals for the Fifth Circuit to review the final judgment of that Court in the above-entitled cause entered on the 10th day of June 1952 (R. 263).*

Opinion

The decision of the Court of Appeals was per curiam, entered (R. 263) without opinion, affirming the judgment of the United States District Court entered, likewise, without opinion on the 28th day of November 1950 (R. 241) approving, ratifying and confirming the order of the Ref-

* Record references are to Vol. I unless otherwise indicated.

eree in Bankruptcy for the Court, entered the 4th day of October 1950 (R. 232; par. 7).

Jurisdiction

The jurisdiction of this Court is invoked under the provisions of Section 240(a) of the Judicial Code, as amended, 28 USC 347, the judgment below being in such conflict with decisions in other circuits on the same point as to confuse the law on the question here involved, and is contrary to the law as expressed by this Court on the same point. Those conflicts deny to petitioners equal justice under the law. Further, the importance of the question to the business community in its economic significance necessitates an authoritative expression by this Court on the appropriate rule of law which should govern such matters.

Question Presented

The single question here presented is whether bankrupts, at the date of bankruptcy, had a right in a claim against the Government of the United States based upon the carry-back of a net operating loss under the provisions of the Internal Revenue Code which passed to their trustee in bankruptcy.

Statutes Involved

The pertinent statutes, 11 USC 110 (a)(5)(6) and 26 USC 48 (a) and 122 (b)(1), are printed in the Appendix *infra* at pages 9 and 10.

Statement

Husband and wife filed a joint Federal income tax return for the calendar year 1941 and each filed a separate return for the calendar year 1942, paying the tax shown therein to be due (R. II 97, 102, 104). Involuntary petition in bankruptcy was filed against them on the 3rd day of November

1943 (R. II 261). Claims to the Bureau of Internal Revenue were filed in 1944 by the taxpayers seeking the refund to them of the amounts paid as Federal income tax respecting the calendar years 1941 and 1942 based on the effect of a carry-back of the net operating loss for the entire calendar year 1943 (R. II 129, 133, 136).

The trustee did not operate the business of the bankrupts after bankruptcy and did not prepare their return of net income for the year 1943, or the claims for refund filed (R. 175). Award of the refund, with certain adjustments for interest, was made by Treasury Department check dated the 4th day of April 1950 and it was mailed to the Trustee in Bankruptcy (R. II 260).

The Government of the United States and its agencies are not involved in the litigation here, and cannot become involved as a result or outcome of this proceeding.

Petitioners herein sued in District Court for declaratory judgment with respect to the rights to this fund (R. 4) naming the Trustee as defendant (R. 15). The cause was transferred by the Court to the Referee in Bankruptcy (R. 21, 28, 30, 43). The decisions and judgments as result of the trial were as heretofore stated.

Petitioners claimed the fund on the basis of attorney's lien in favor of their antecedent, Richard G. Wooton, deceased, under authority of compliance with local law and Federal decisions. Their capacity to prosecute this action, they being all the heirs at law of the deceased, is not in question here.

Reasons Relied upon for Allowance of the Writ

1. *The judgment is in conflict with judgments on the same question in other circuits*

In all reported decisions on the question here in issue, regardless of whether the right in question be one respect-

ing tax refunds or any other type of claim, the basic question has been identical in all: that is, whether maturity had been reached at date of bankruptcy to the point where the bankrupt actually had a right to institute a claim of any sort, even though at date of bankruptcy the bankrupt might not be able to exercise it.

The judgment below is in direct conflict with those of the Second and Sixth Circuits on that basic question. This is the conflict:

(1) The Fifth Circuit holds that on November 3, 1943, the bankrupts had a right to a refund based upon operations for the entire calendar year 1943 and that this right passed to the trustee.

(2) The Second Circuit held in 1941 [1] that a right such as this had not ripened into a claim which would pass to the trustee.

(3) The Sixth Circuit held in 1944 [2] under similar facts that no right had ripened in the bankrupt and the proceeds could not pass to the trustee.

The Court below disagreed with the law declared by the Second and Sixth Circuits and passed to the trustee a fund derived from a right which did not come into being until after bankruptcy. Thus a sharp cleavage exists among the Courts of Appeals of these Circuits.

The *Lockhart* case involved a claim already filed when the bankruptcy petition was filed against the claimant. The bankrupt sought the allowance of fees under supervision of the court and filed the claim before the date of bankruptcy; less than one week after bankruptcy the court allowed the claim and the bankrupt collected the fee. The trustee claimed the money and it was denied to him by the Second Circuit because, at date of bankruptcy, the bankrupt's claim had not matured.

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[1] *Lockhart* v. *Mittleman*, 123 F(2d) 703.

[2] *Tennessee Valley Authority* v. *Kinzer*, 142 F(2d) 833.

The *Tennessee Valley Authority* case involved a bankrupt's claim for vacation pay and his contributions to a retirement fund at the date he was separated from the service of TVA. The trustee sought these funds on grounds that they were due and owing to the bankrupt and, hence, to his bankruptcy estate. Not so, held the Sixth Circuit, since he had no right at date of bankruptcy and any right he might have would mature after bankruptcy. The taking was denied to the trustee. Those, also, are basically the facts in this case.

Here at the date of bankruptcy the bankrupts had no right to a refund under the provisions of the Internal Revenue Code, Section 122. That provision of law authorizes relief for a net loss sustained in the operation of a business for any taxable year, and the relief is a sum of money measured by all or a part of taxes paid properly for prior years. The Internal Revenue Code, in situations where returns are filed on a calendar year basis, contains no provision for prorating a net operating loss to any portion of the complete calendar taxable year, and there are no contrary administrative rulings. The complete year is the taxable unit and the results for the entire calendar year as a unit constitute the measuring rod to determine whether a taxpayer qualifies for the application of the carry-back provisions of the Internal Revenue Code.[3] The relief, therefore, depends on two essential predicates:

(1) The expiration of the full and complete calendar taxable year 1943 in which fell the date of the bankruptcy, and

(2) The fact of a net operating loss for that year.

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[3] The returns of the bankrupts were filed for the calendar years 1941, 1942 and 1943 but, because of the provisions of the Current Tax Payment Act of 1943, the years 1942 and 1943 are referred to administratively by the Bureau of Internal Revenue as one year, namely, 1943 (R-161, 162). It was the loss shown on the 1943 return which was basis for the claim for refund.

Both those factors in this case were determinable under law only after bankruptcy. The facts thus place this case within the holdings of the cases cited above from the Second and Sixth Circuits. The conflict under which two other circuits exclude the same thing from bankruptcy estates, while the Fifth Circuit includes it, is clear. This conflict is particularly significant in view of the responsible role played by the United States Courts of Appeals in the appellate capacity, where they are, in most cases, courts of last resort.

2. *The judgment below is in conflict with the decisions of this Court dealing with this subject matter*

The established view of this Court on the question of rights which pass is reflected in two of its decisions which have weathered the ravages of nearly three-quarters of a century and which have never been modified in any respect, have never been distinguished, and have never been disregarded in any other instance than this.[4] Those decisions make clear the enduring view of this Court to be that any right resting in the bankrupt at date of bankruptcy, whether bankrupts be with or without a remedy, must go to the estate. It was the rule of these two cases which was followed by the Second and Sixth Circuits and overlooked by the Fifth Circuit below.

In this case the right came into being as a result of the tax return filed for the entire calendar year 1943. The operating results for the entire calendar year of 1943 were established essentially and indivisibly from operating experience that occurred both prior to and subsequent to bankruptcy which took place during this calendar taxable year. This was the basis upon which the Bureau of Internal Revenue after due audit and examination allowed the refund which is in controversy in this proceeding (R. II 69, 72,

[4] *Erwin* v. *United States*, 97 U.S. 392; *Williams* v. *Heard*, 140 U.S. 529.

74). This Court apparently clarified that logic in its discussion of the technical aspects of the net operating loss carry-back provisions of the Internal Revenue Code.[5] The undisputed language of those decisions, however, was disregarded in the judgment below.

3. *The far-reaching implications of the carry-back provisions of the Internal Revenue Code require further consideration by this Court.*

Section 122 of the Internal Revenue Code which embodies the carry-back provision is now only ten years old, having first been enacted in 1942 (R. 161). Experience teaches that about that period of time usually has been required for the tide of litigation on important questions to develop. Thus, we now stand at the threshold of mounting litigation and the law is without a beacon if this conflict be allowed to continue. The basic question in this litigation is the proper application of the provisions of Section 122 of the Internal Revenue Code in matters arising in bankruptcy where the bankruptcy occurs within the taxable year of the net operating loss. Since six to eight thousand business failures occur annually, the question is bound to arise with regularity.

This Court granted certiorari in the *Manning* and *Reo* cases *supra* for important reasons which it described as:

> "Because of the frequency of the use of the carry-back provision of the Internal Revenue Code."

That frequent use will undoubtedly have increasingly vexing repercussions in the field of bankruptcy. The judgment below is proof that the law as pronounced by this Court on this subject is not yet clearly comprehended, or heeded.

It was observed by this Court in the *Manning* and *Reo* cases *supra* that there was wide use of the carry-back pro-

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[5] *Reo Motors, Inc.*, v. *CIR*, 338 U.S. 442; *Manning* v. *Seeley Tube and Box Company of New Jersey*, 338 U.S. 561.

visions. That use, of course, includes use by every business unit in the United States because the section is limited by its terms exclusively to business operations. This demonstrated conflict among the circuits likewise affects these businesses. Furthermore, this conflict involves not only the Internal Revenue Code but the bankruptcy statute as well where the administration of the bankrupt estate is threatened in its orderly and stable execution from the national point of view. An authoritative expression by this Court on this important question holds the promise of stemming a flood of litigation at its source, as well as regulating the conduct of litigation toward a course of uniformity in judgments.

Conclusion

The judgment below is in conflict with the holdings of the Courts of Appeals of the Second and Sixth Circuits. It does not follow the pronouncements of law of this Court on the subject of the definition of the rights which constitute a bankrupt estate as well as being in conflict with the expression of this Court on the operation of the carry-back provision of the Internal Revenue Code. Finally, the judgment below can only lead to confusion in this important and growing area of the law which only the authoritative ruling of this Court can prevent.

It is therefore respectfully requested that this Court issue its writ.

Respectfully submitted,

SEYMOUR KRIEGER,
Attorney for Petitioners.

Dated: September 6, 1952.

KRIEGER & JORGENSEN,
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Washington, D. C.

APPENDIX

Bankruptcy Act

§ 110. Title to property

a. The trustee of the estate of a bankrupt and his successor or successors, if any, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt as of the date of the filing of the petition in bankruptcy or of the original petition proposing an arrangement or plan under this title, except insofar as it is to property which is held to be exempt, to all . . . (5) property, including rights of action, which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him, or otherwise seized, impounded, or sequestered: *Provided,* That rights of action ex delicto for libel, slander, injuries to the person of the bankrupt or of a relative, whether or not resulting in death, seduction, and criminal conversation shall not vest in the trustee unless by the law of the State such rights of action are subject to attachment, execution, garnishment, sequestration, or other judicial process: *And provided further,* That when any bankrupt, who is a natural person, shall have any insurance policy which has a cash surrender value payable to himself, his estate, or personal representatives, he may, within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own, and carry such policy free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings, otherwise the policy shall pass to the trustee as assets; (6) rights of action arising upon contracts, or usury, or the unlawful taking or detention of or injury to his property . . . (11 U.S.C. Sec. 110 (a) (5) (6)).

Internal Revenue Code

§ 48 (a) Taxable year. "Taxable year" means the calendar year, or the fiscal year ending during such calendar

year, upon the basis of which the net income is computed under this Part. "Taxable year" means, in the case of a return made for a fractional part of a year under the provisions of this chapter or under regulations prescribed by the Commissioner with the approval of the Secretary, the period for which such return is made. (26 U.S.C. Sec. 48(a))

§ 122.(b)(1) Net operating loss carry-back. If for any taxable year beginning after December 31, 1941, the taxpayer has a net operating loss, such net operating loss shall be a net operating loss carry-back for each of the two preceding taxable years, except that the carry-back in the case of the first preceding taxable year shall be the excess, if any, of the amount of such net operating loss over the net income for the second preceding taxable year computed (A) with the exceptions, additions, and limitations provided in subsection (d) (1), (2), (4), and (6), and (B) by determining the net operating loss deduction for such second preceding taxable year without regard to such net operating loss. (26 U.S.C. Sec. 122 (b)(1))

INDEX

Subject Index

	Page
I. Objections to Sufficiency of Petition and Record for Writ of Certiorari	1
II. Response Proper to Petition for Writ of Certiorari	5
"Jurisdiction"	5
"Question Presented"	5
"Statement"	6
"Reasons Relied Upon for Allowance of the Writ"	8
"1. The judgment is in conflict with judgments on the same question in other circuits."	9
"2. The judgment below is in conflict with decisions of this Court dealing with this subject."	11
"3. The far-reaching implications of the carry-back provisions of the Internal Revenue Code require further consideration by this Court."	12
III. Affirmative Argument	13
The Carry-Back Refund was Property Which Passed to Trustee in Bankruptcy	14
Title Passed to Trustee by Operation of Law	16
The Attempted Assignment to Wooton is Void under Bankruptcy Act	16
The Theory of Petitioners is not Supported by the Facts	17
Conclusion	18
Appendix—Findings of Fact and Conclusions of Law of Referee	19

TABLE OF CASES

	Page
Alexander, Administratrix, et al. v. *Spencer Kellogg & Sons, Inc.*, 76 L. Ed. 903, 325 U. S. 502, 510	3
Anderson v. *Abbot, et al.*, 88 L. Ed. 793, 321 U. S. 349, 356	3
Comegys v. *Vasse*, 1 Peters 195, 7 L. Ed. 108	15
Erwin v. *United States*, 97 U. S. 392	11
Goodyear Tire & Rubber Company, Inc. v. *Ray-O-Vac Company*, 88 L. Ed. 721, 321 U. S. 275, 278	3
Hamilton-Brown Shoe Company v. Wolf Bros. & Co., 240 U. S. 251, 36 S. Ct. 269, 60 L. Ed. 629	3
Lockhart v. *Mittleman*, 123 Fed. 2d 703	10
Manning v. *Seeley Tube and Box Company of New Jersey*, 338 U. S. 561	12
McWilliams, Trustee, v. *Edmonson*, 162 Fed. 2d 454	13
Newton, et al., v. *Glenn, et al.*, 149 Fed. 2d 879	13
Pollack v. *Meyer Bros. Drug Co.*, 8th Cir., 233 Fed. 861	16
Reo Motor Company v. *C. I. R.*, 338 U. S. 442	12
Tennessee Valley Authority v. *Kinser*, 142 Fed. 2d 833	10
United States of America v. *Aetna Casualty & Surety Company*, 338 U.S. 366	16
United States of America v. *Commercial Credit Company*, 76 L. Ed. 978, 268 U. S. 63	4
Williams v. *Heard*, 140 U. S. 529	11
Daisye B. Wooton, et al. v. *United States*, 114 Court of Claims, 608, 86 Fed. Supp. 143, 339 U. S. 904, 94 L. Ed. 1333	8

STATUTES

Section 240 (a), Judicial Code as amended 28 U. S. C. 347	5
Section 93 (e), (f) and (g), Title II, United States Code Annotated	16

COURT RULES

Rule 27, Supreme Court of the United States	3
Rule 38 (5), Supreme Court of the United States	3

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 325

DAISYE B. WOOTON, ET AL.,

Petitioners,

versus

G. M. McWILLIAMS, TRUSTEE IN BANKRUPTCY FOR F. T. NEWTON AND MRS. ETHEL FLURRY NEWTON, BANKRUPTS

RESPONSE OF G. M. McWILLIAMS, TRUSTEE IN BANKRUPTCY OF F. T. NEWTON AND MRS. F. T. NEWTON, BANKRUPTS, TO PETITION FOR WRIT OF CERTIORARI OF DAISYE B. WOOTON, ET AL.

The respondent respectfully represents and shows to the Court the following, to-wit:

I

Objections to Sufficiency of Petition and Record for Writ of Certiorari

1. The petition does not conform to the requirements of Rule 38 of this Court:

(a) In that under said rule a certiorari petition "shall be accompanied by a certified transcript of the record in

the case." Only a part of the record has been filed in this Court, there having been certified only the printed part of the record in Cause Number 13,577 of the United States Court of Appeals for the Fifth Circuit, which is substantially less than the whole record. The two volumes making the part of the record submitted to this Court is not the whole record. A part of that before the Referee in Bankruptcy and the United States District Court for the Hattiesburg Division of the Southern District of Mississippi consisted of three printed volumes of transcript of record in Cause Number 11,306, United States Circuit Court of Appeals for the Fifth Circuit, in suit styled F. T. Newton and Mrs. F. T. (Ethel Flurry) Newton, Appellants, vs. Frank S. Glenn, et al., being Cause Number 395 on file at the October, 1945, Term of this Court, on petition for writ of certiorari, and which petition was denied by this Court on October 22, 1945; and the record also consists of two printed volumes in Cause Number 11,905 of the United States Circuit Court of Appeals for the Fifth Circuit, styled Mrs. John B. Edmonson, Petitioner, vs. G. M. McWilliams, Trustee in Bankruptcy of F. T. Newton and Mrs. F. T. Newton, Bankrupts, with Cause Number 287 in the October, 1947 Term of this Court, and which petition for certiorari was denied by this Court on December 8, 1947; and the record also consists of certified copy of record of Court of Claims of the United States, styled Daisye B. Wooton, et al., vs. United States, with Court of Claims Number 49010, and involving the identical subject matter now before this Court, and from adverse judgment petitioners here sought review of judgment of Court of Claims, but petition for certiorari was denied by this Court in Cause Number 516, on February 20, 1950. These parts of the records before said Circuit Court of Appeals and said Court of Claims are not before this Court.

(b) The petition does not conform to that part of said Rule 38 which requires that "the petition shall contain a summary and a short statement of the matters involved;" and the supporting brief is not direct and concise, and fails to recognize the factual background for decision of the Referee in Bankruptcy, the District Court, the Circuit Court of Appeals, and the Court of Claims.

(c) The petition does not assign "special and important reasons" for writ of certiorari, as required by Rule 38 (5) of this Court.

(d) There is total absence of conflict of decisions of the Circuit Court of Appeals with decisions of other like courts, and no important question of federal law is involved, and there is total absence of substantial federal question or case of gravity and importance to justify granting petition.

> "The decree that was to be reviewed by certiorari at complainant's instance was not a final one, a fact that of itself alone furnished sufficient ground for the denial of the application; besides which it appears by reference to our files that the application was opposed by the present petitioner upon the ground that the case, however important to the parties, involved no question of public interest and general importance, nor any conflict between the decisions of state and federal courts, or between those of federal courts of different circuits." *Hamilton-Brown Shoe Company v. Wolf Bros. & Co.*, 240 U. S. 251, 36 S. Ct. 269, 60 L. Ed. 629.

2. The supporting brief does not conform to Rule 27 of this Court in that a concise statement of the grounds on which the jurisdiction of the court is invoked is not furnished and neither is there a concise statement of the case containing all that is material to the consideration of the

awkwardly presented questions, and with no page references to the printed record.

3. Findings of fact concurred in by the Referee in Bankruptcy, the United States District Court for the Southern District of Mississippi, and the United States Circuit Court of Appeals for the Fifth Circuit, will be accepted by the Supreme Court unless error is shown, and no such error exists in this record. This "two-court rule" operates as well upon consideration of application for certiorari as in the decision of cases upon the merits. Said Referee in Bankruptcy, and the District Court and the Circuit Court of Appeals in this cause were in accord on all issues of law and the findings of fact. The petition for writ of certiorari, because thereof, should be denied.

> "The two courts below are in agreement as to the inferences fairly to be gathered from the facts, and their findings are not to be disturbed unless clearly erroneous." *United States of America* v. *Commercial Credit Company,* 76 L. Ed. 978, 268 U. S. 63.
>
> "Both courts below, after painstaking examination of the evidence, found there was such privity or knowledge and accordingly ruled that the claim for limitation must be denied. We accept this concurrent finding. There was sufficient evidence to support it." *Alexander, Administratrix, et al.* v. *Spencer Kellogg & Sons, Inc.,* 76 L. Ed. 903, 285 U. S. 502, 510.
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> "The Circuit Court of Appeals reexamined the findings in the light of the evidence and accepted them. It must be a strong case in which this court will set aside these concurrent findings of two courts. We think this is not such a case." *Goodyear Tire & Rubber Company, Inc.* v. *Ray-O-Vac Company,* 88 L. Ed. 721, 321 U. S. 275, 278.
>
> "Some of these findings have been challenged. But we do not stop to examine the evidence. We accept those findings, as they were concurred in by two courts and no clear error is Shown." *Anderson* v. *Abbot, et al.,* 88 L. Ed. 793, 321 U. S. 349, 356.

II

Response Proper to Petition for Writ of Certiorari

"Jurisdiction"

Under this heading it is claimed that the provisions of Section 240(a) of the Judicial Code, as amended, 28 U. S. C. 347, constitute basis for jurisdiction of this Court, and it is further stated that the United States Circuit Court of Appeals has entered judgment "in such conflict with decisions in other circuits on the same point as to confuse the law on the question here involved, and is contrary to the law as expressed by this Court on the same point," the idea being that the conflicts deny to petitioners equal justice under the law. It is further claimed that importance of the question to the business community in its economic significance necessitates an expression by this Court; but it is not pointed out wherein there exists the variance, and the same contentions have been made in all of this litigation, with the Supreme Court of the United States, as hereinbefore mentioned, having three times already denied petitions for writs of certiorari, and in the last of these denials there was involved the same petitioners and the same funds and the same assignment of November 2, 1943, made by the bankrupts to their accountant Richard G. Wooton, now deceased, and it is the heirs of the deceased seeking to obtain the $58,858.67 to the exclusion of creditors with unpaid claims of approximately two million dollars, as will be disclosed through the records involving matters in the three petitions for writs of certiorari to this Court.

"Question Presented"

Petitioners claim that the single question presented is whether bankrupts at date of bankruptcy had a right in a claim against the Government of the United States based

upon the carry-back of a net operating loss under the provisions of the Internal Revenue Code which passed to their trustee in bankruptcy. The fund involved had been paid in by the bankrupts in 1941 and 1942, and the bankrupts had defaulted and gone out of business in economic destruction in October of 1943. They had conveyed away to members of their family and to others having fiduciary relationship with them all that they had, and Richard G. Wooton, now deceased, whose heirs are making claim, was the accountant and attorney for these bankrupts at the time of their default on government contracts, set forth and fully identified in the five volumes of records involved in the first two matters reaching this Court by way of petitions for writs of certiorari.

"Statement"

Petitioners correctly state that the husband and wife, being the two bankrupts, filed a joint federal income tax return for 1941, and separate returns for 1942; and it is true that involuntary petition in bankruptcy was filed against the bankrupts on the Third day of November, 1943. Petitioners fail to state that they conveyed away all of their property at a rapid rate, beginning with August of 1943, and that real estate belonging to these bankrupts was conveyed to a sister of one of them, and this property, after same was made available to the trustee with denial of petition for writ of certiorari by this Court on December 8, 1947, sold for more than $300,000.00, and that money was made available to pay creditors approximately twelve per cent of the more than two million dollars of debts. The petitioners fail to disclose in their statement that it was not until August 30, 1944 that the Newtons were adjudged bankrupts, and that this adjudication did not become final until the order of this Court of October 22, 1945, and identified in 326 U. S. 758, 90 L. Ed. 456. Petitioners did not disclose that

the Newtons carried on business of subcontractors by fiction for themselves in the names of others in violation of the law relating to the handling of public building contracts involving army requirements, and that with the loss of the business in October of 1943 they gave to their relatives all of their money and all of their property of every kind and character, excepting that here involved and sought to be assigned to Richard G. Wooton, accountant for the bankrupts, by written assignment dated November 2, 1943, with equipment located in Mississippi turned over to J. B. deVillentroy, and that large sums of money were obtained from disposition of government bonds and from other sources, and only a part thereof was recouped, and that the bankrupts and said J. B. deVillentroy were indicted for the crimes committed by them in connection therewith, and pleaded guilty and were given sentences by the United States District Court. Petitioners further fail to disclose that the very funds involved in this litigation were in litigation in the Court of Claims of the United States, with the Honorable Seymour Krieger as attorney for petitioners in that cause, being the same attorney presenting the matter here, and which Court of Claims litigation bears Cause Number 516 in this Court, and petition for writ of certiorari was denied on February 20, 1950, as aforesaid.

The petitioners are in error that the trustee did not operate the business of the bankrupts after bankruptcy. The records in five volumes in two causes to reach this Court, aforesaid, disclose that a receiver was appointed and that real property valued at approximately $400,000.00, and most of which the bankrupts had sought to give away to a sister of one of them, was rented and monies obtained therefrom.

Petitioners are in a measure correct in statement that the Government of the United States and its agencies are not

involved in the litigation here and cannot become involved as a result or from outcome of this proceeding; but the United States was a party defendant in the Court of Claims suit styled Daisye B. Wooton, Widow of Richard G. Wooton, Deceased, et al., *vs.* United States, 114 Court of Claims, 608, 86 Fed. Supp. 143, 339 U. S. 904, 94 L. Ed. 1333. The United States of America originally had claim asserted by the Commissioner of Internal Revenue of a deficiency against the bankrupts of $223,000.00. Approximately $108,000.00 with interest was paid by the trustee in bankruptcy, but with understanding that this payment would not affect the rights of the trustee to the $52,858.67. Judge Littleton for the Court of Claims set forth a table of these facts.

Petitioners are in error that suit was filed in the district court for declaratory judgment. A very peculiar pleading was filed, naming no defendant, but seeking to get the funds, and this petition was filed after these same parties had lost in the Court of Claims. (R. 4). It was not until motion to dismiss for failure to have named a party to the petition for declaratory judgment, that trustee in bankruptcy became a party to the litigation, and the pleadings do not yet assert a claim or attempt to assert a claim directly against the trustee in bankruptcy.

Petitioners now claim the funds on basis of attorney's lien in favor of their antecedent, Richard G. Wooton, deceased, but when they were in the Court of Claims aforesaid, there was involved the assignment of November 2, 1943, and which assignment is dated just one day before the petition in bankruptcy was filed.

"Reasons Relied Upon for Allowance of the Writ"

Under the foregoing heading, petitioners furnish their argument in three sections or parts, to claim that the judgment affected by the appeal is in conflict with judgments

on the same question in other circuits, and also to claim that said judgment is in conflict with the decisions of the Supreme Court, and that there are far-reaching implications of the carry-back provisions of the Internal Revenue Code, to require further consideration by the Court. None of these positions are tenable or applicable to the facts disclosed in the full record, which should be, but is not, before the Court.

"1. The judgment is in conflict with judgments on the same question in other circuits."

The issue is not that claimed for petitioners, because the question is not whether maturity had been reached at date of bankruptcy to the point where the bankrupts actually had a right to institute a claim. However, the record here involved, and the findings of the Referee in connection therewith which were approved by the District Court, and Said Circuit Court of Appeals, require conclusion (1) that the judgment of the Court of Claims was res judicata as to petitioners, and (2) that when R. G. Wooton failed to file and probate claim, if any he had, under the Bankruptcy Act, such, if any, was barred thereby, and (3) that the alleged assignment was a scheme to cheat and defraud the creditors of the Newtons, to thereby avoid the claim, and (4) that petitioners offered no proof of agreement between the Newtons and Wooton except the written assignment of November 2, 1943, and they attempted to base no claim on the assignment, and in fact, the assignment did not include the carry-back loss, and (5) that the original and basic proceeding was in equity, and petitioners seek relief in violation of equity maxims, and (6) that the funds here in question were in custody of the trustee in bankruptcy and a part of general funds for creditors at the time of this suit. For either of these reasons there could be no recovery, and the reasons assigned by petitioners

are not applicable to the facts. For convenience of the Court, a copy of the findings of fact and conclusions of law of the Referee, dated September 30, 1950, appears in the appendix at pages 19 to 26.

Throughout this entire proceeding petitioners seek to recover solely and only on the weakness of appellees' title and never assert or show the strength of their own title. In fact, their petition wholly fails to show any title in petitioners.

The judgment of the United States Court of Appeals for the Fifth Circuit, and appearing at pages 263 and 264 of Volume I of the record, is not in conflict with judgments of the Second and Sixth Circuits, as claimed for petitioners. In fact, the judgment of said Court is based upon a per curiam opinion. The United States District Judge entered order on November 28, 1950 (R. 241), approving final judgment of Referee in Bankruptcy dated October 4, 1950 (R. 233-234). Stated differently, the Circuit Court of Appeals had before it the records and the findings of facts and conclusions of law of the Referee which had been approved by the District Court, and in which there were identified many reasons why petitioners should not prevail, and why the trustee in bankruptcy should prevail. In fact, the defense of the trustee before the Referee had been that the petition did not state a claim on which relief could be granted, and that the proceedings in the Court of Claims, aforesaid, would constitute a bar to recovery, and that the factual data appearing in the petition was untrue, but if true, same constituted a part of a general fraudulent scheme of the bankrupts to cheat, hinder, delay and defraud their creditors, and that the attempted transfer of funds to Wooton was a fraudulent preference. (R. 25-28).

The cases of *Lockhart* vs. *Mittleman*, 123 Fed. 2d 703, and *Tennessee Valley Authority* vs. *Kinser*, 142 Fed. 2d

833, speak for themselves, but there is nothing conflicting in either of those opinions with that appearing in this cause. In these two cases it was held that under the facts there the bankrupt did not have a right which they "could by any means have transferred." The Bankruptcy Act places with the trustee all that is subject to transfer. The seven printed volumes of records involved in this cause demonstrate that the bankrupts squandered their property and sought to place it beyond reach of creditors, and had gotten rid of it to various parties under their control and in their employ, including Richard G. Wooton, in the latter part of 1943, and that they did no business after about the middle of October of 1943, and they had lost large sums of money prior to their discontinuing business in the early days of October of 1943. Under this state of facts, Richard G. Wooton, now deceased, had no claim to the carry-back loss, regardless of the case law on any phase of the subject. The issues presented to the Court in this cause in no way involve Section 122 of the Internal Revenue Code.

"2. The judgment below is in conflict with decisions of this Court dealing with this subject."

Under this heading are identified the cases of *Erwin* v. *United States,* 97 U. S. 392, and *William* vs. *Heard,* 140 U. S. 529. The *Erwin* case involved an Act of Congress to take care of loss to an individual of cotton captured by the military forces of the United States during the Civil War. It was there claimed that the claim at the time of the filing of the petition in bankruptcy did not constitute an enforceable claim against the Government, but the court held that the claim was unsound, and that when the appellant filed his petition in bankruptcy his claim against the Government was property thereof of uncertain value. It should be pointed out that in the suit now before us, it is

not even claimed for the Wooton heirs that Wooton was an assignee. That contention apparently was abandoned to try to get around the litigation of the same subject matter in the Court of Claims.

The case of *Williams vs. Heard,* supra, is just as much inapplicable. The court only held that vested rights ad rem and in re possibilities coupled with interest on claims growing out of property, pass to the assignee in bankruptcy. The petitioners fail to recognize the finding of facts against them that $108,000.00 was paid the United States Government for income taxes at a time when the suit was pending in the Court of Claims, and that as a part of the plan with the Government the funds would go to the trustee in bankruptcy to the exclusion of all others, and that "if any assignment was made or attempted to be made, either oral or in writing, it was part of a well devised plan to put their property beyond the reach of their creditors." (R. 228). These findings of fact entirely avoid the application of the law petitioners seek to make.

"3. The far-reaching implications of the carry-back provisions of the Internal Revenue Code require further consideration by this Court."

The contentions, of petitioners notwithstanding, there is no factual data in this record to require or permit the interpretation of Section 122 of the Internal Revenue Code. It was necessary to a decision of the rights of the parties in the case of *Reo Motor Company vs. C. I. R.,* 338 U. S. 442, that said law be considered. However, the court in that case recognized that the issue was whether in computing net operating loss the governing statutes would be those in effect during the year when the transaction occurred, or the statutes in effect during the year when the net operating loss deduction was taken. The case of *Man-*

ning vs. Seeley Tube and Box Company of New Jersey, 338 U. S. 561, cited by petitioners, did involve said Section 122, but only in a collateral way, and having to do with whether or not the interest on the amount would abate. Nothing in those cases or any other cases or law cited or referred to by petitioners apply to the facts of this cause.

III

Affirmative Argument

This case involves a complex set of facts. Litigation has been extended as related to funds of the bankrupts and the efforts of the trustee to gain some of same so dividends may be available for creditors with probated claims aggregating more than two million dollars. (R. 230). When the original bankruptcy record in three volumes, being a part hereof, reached the United States Circuit Court of Appeals for the Fifth Circuit in 1945, with case styled *Newton, et al.* v. *Glenn, et al.*, 149 Fed. 2d 879, the court concluded that the bankrupts had conveyed, removed and concealed their property with intent to hinder, delay and defraud their creditors, and had transferred while insolvent their property with intent to prefer, and they had permitted others to obtain liens upon their property through legal proceedings, and there was the existing receivership. This Court, on petition for certiorari, filed for the bankrupts, denied the petition on October 22, 1945 (326 U. S. 758). The bankrupts had conveyed away property valued at $450,000.00, and on June 23, 1947 the suit of the trustee seeking to obtain title to that property against a sister of one of the bankrupts reached the Circuit Court of Appeals for the Fifth Circuit. The district judge had decided with the party holding the property, but on appeal said Circuit Court of Appeals reversed the trial court and entered judgment for the trustee in bankruptcy, *McWil-*

liams, Trustee, v. *Edmonson,* 162 Fed. 2d 454. Petition for certiorari to this Court was denied on December 8, 1947, 332 U. S. 835. The record and judgment of the Court of Claims of October 3, 1949, and already identified, reached this Court and on February 20, 1950 petition for certiorari was denied, 339 U. S. 903. Stated differently, the rights of the parties have been so thoroughly adjudicated and reviewed on petitions for certiorari three times by this Court, and in the last review the identical funds were involved when the petitioners invoked the jurisdiction of the Court of Claims, and we claim that the decision of the Court of Claims was res judicata. There is some evidence in this record that Richard G. Wooton was to get a fee of $25,000.00; but the Referee found as a fact that a bill had been rendered by Wooton to the bankrupts for $15,000.00, and he had been paid $10,000.00 thereof (R. 222). The Referee found that the attempted assignment was a scheme to cheat and defraud the creditors of the Newtons, and therefore void. That stated for petitioners in the Court of Claims is in contradiction of that stated in the United States District Court in Hattiesburg, Mississippi. The Referee in Bankruptcy concluded that petitioners failed to prove that Wooton, deceased, established carry-back, and this conclusion is required by testimony of witness Foster Griffin (R. 205). The whole record would require conclusion that the Wootons would under no circumstances be entitled to the funds.

The Carry-Back Refund was Property Which Passed to Trustee in Bankruptcy

The trustee in bankruptcy held this money prior to the filing of this suit. In fact, the United States of America turned the funds over to the trustee in bankruptcy after the Wootons had lost their claim thereto in the Court of

Claims, aforesaid. Petitioners refer to the case of *Erwin v. United States,* supra. Argument was made in that case that the unenforceable claim against the United States would constitute property which passed to the trustee.

> "When the appellant filed his petition in bankruptcy, his claim against the government was property, though of uncertain value."

The earliest case on the subject is that of *Comegys vs. Vasse,* 1 Peters 195, 7 L. Ed. 108. In that case, a man named Vasse had a claim against the Spanish Government for injuries inflicted upon his property in the State of Florida. Under the Treaty of Amity between the United States of America and the King of Spain the United States collected $8,000.00 in settlement of the claim, and in the meantime Vasse had gone into bankruptcy, and the United States paid the money to the assignee in bankruptcy. The bankrupt sued the assignee, claiming the title to the chose in action was not property as passed to the assignee. Mr. Justice Story held that the claim, although practically unenforceable, passed to the bankrupt estate. The case was reexamined and approved by the Supreme Court of the United States in *Phelps vs. McDonald,* 99 U. S. 298, 25 L. Ed. 473, where it was held that the claim of an individual against a foreign government passed to the bankrupt estate.

In the case of *Williams vs. Heard,* supra, cited by petitioners, the court held that the property there involved "was property of the bankrupt" and the assignee in bankruptcy was entitled thereto.

> "There are many equitable interests which, if owned by the bankrupt, may be of value and increase the assets of the estate, and yet not be subject to seizure on execution; but, being transferable, they will pass to the trustee. Thus it has been held that a seat on

> the Stock Exchange, which can only be transferred with the consent of the officers of the Exchange, will pass to the trustee, if it has a value. . . . That vested remainders pass to the trustee seems to me beyond question." *Pollack* v. *Meyer Bros. Drug Co.*, 8th Cir., 233 Fed. 861.

There is no conflict in opinions of the various Circuit Courts of Appeal on the question here involved. Nothing in the law requires conclusion different from that already reached by the several lower courts involved. No confusion exists for clarification.

Title Passed to Trustee by Operation of Law

The authorities are in accord that the anti-assignment statute of the United States, 31 U. S. C. 203, does not prohibit passage of title by operation of law. *United States of America vs. Aetna Casualty &Surety Company,* 338 U. S. 366.

The Attempted Assignment to Wooton Is Void under Bankruptcy Act

Section 107 (d) 6 of Title 11, United States Code Annotated, precludes that sought to be done and upheld for R. G. Wooton and/or his heirs. There is nothing in the record to show that the Wootons were purchaser in good faith and for a present fair consideration. That sought to be done for the Wootons is in violation of Section 93 (e), (f) and (g) of Title 11, United States Code Annotated. In additon thereto, this cause arose in a court of equity. It surely would not be equitable for the Wooton heirs to get more than $50,000.00 of money to satisfy what they claim is a valid charge against the Newton bankruptcy estate not to exceed $10,000.00 or $15,000.00, and this is the more true when there are more than two million dollars

of probated claims, and only twelve per cent of dividends have been paid.

The Theory of Petitioners Is Not Supported by the Facts

The issues created by the pleadings in this cause do not raise the claimed single question as to whether or not the bankrupts had a right in a claim against the government based upon the carry-back of a net operating loss under Section 122 of the Internal Revenue Code. The questions created by the pleadings primarily dealt with the fact that the Wooton claim made a part of the general fraudulent scheme of the bankrupts to cheat, hinder, delay and defraud the creditors of the bankrupts, and that if Wooton were a claimant for work performed, he should have probated his claim as provided by the Bankruptcy Act, and if he received the funds the court would be furnishing a fradulent preference, and that the suit arose in a court of equity and that a court of equity would look with disfavor on the Wootons' receiving five hundred per cent of their claim and more, if any claim they had, while the creditors having more than two million dollars of probated claims would have to be satisfied with twelve per cent. In addition thereto, funds of the bankrupts held by the trustee were used to the extent of $108,000.00 to pay taxes, at a time when the United States through its Department of Internal Revenue owed them more than $52,000.00, and it was a part of the plan worked out when the $108,000.00 was paid that at the conclusion of the suit in the Court of Claims the money would be paid by the Government to the trustee, and this the Government Agency did when this Court denied petition for writ of certiorari to the Court of Claims. The entire factual basis for all of that appearing before the Referee on the trial here involved is contained in the findings of fact (see appendix).

Conclusion

The judgment of the Referee in Bankruptcy, which had included therein by reference the findings of fact aforesaid, dealt with no issues and involved no conflicts or statements contrary to the holdings of the Courts of Appeal of the Second and Sixth Circuits, or any other Circuit Courts of Appeal. Said judgment, upheld by the District Court, and by the Circuit Court of Appeals for the Fifth Circuit, is supported by law without contradiction. The stated "Question Presented" in petition affected hereby is not the question presented by the pleadings and determined by the Referee to protect the rights of the parties. There is no cause or reason for the petition to be sustained. The Circuit Court of Appeals for the Fifth Circuit has not decided a question in conflict with decisions in other Circuits on the question. All that the Circuit Court of Appeals did was to affirm the District Court, and all that the District Court did was to affirm the findings and judgment of the Referee, and the findings and judgment of the Referee were based upon issues of pleadings contrary to that presented in petition here involved. We submit that the Petition for writ of certiorari is not well taken, and should be denied.

Respectfully submited,

T. C. Hannah,
Hattiesburg, Mississippi.

M. M. Roberts,
Hattiesburg, Mississippi.
Of Attorneys for Respondent.

APPENDIX

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

(Filed Sept. 30, 1950 with Referee)

(Title Omitted)

At Gulfport, Mississippi, in said district, on the 30th day of September, 1950.

I

According to the testimony in this case, between January 1st, 1943, and August 14, 1943, R. G. Wooton determined the tax liability of Mr. and Mrs. F. T. Newton, which involved the income tax liability of the partnership of Newton and Glenn. Wooton employed two accountants to assist him in this work, one of the accountants was named Mr. H. F. Stanley, and the other's name was N. H. Stewart. All services performed by R. G. Wooton, either personally or by Stanley or Stewart, is covered by a bill rendered by R. G. Wooton to F. T. Newton dated September 16, 1943, covering all services rendered during the period from January 1st, 1943 to September 16, 1943, for $15,000.00 upon which bill R. G. Wooton was paid by F. T. Newton, subsequent to October 1st, 1943, the sum of $10,000.00. There is not any testimony in the record as to whether F. T. Newton consented to and approved the bill for $15,000.00. R. G. Wooton, however, has never at any time proved in the bankruptcy proceedings a claim against the estate of F. T. Newton and Mrs. F. T. Newton for any amount whatsoever.

II

The petitioners claim in paragraph IV of their bill that on or about February 11, 1943, R. G. Wooton was employed to undertake re-negotiations of the contracts of Mr. and Mrs. F. T. Newton with the War Department. There is no evidence before the Court that any such services were performed by R. G. Wooton, the value of such services, or the amount agreed to be paid. It charges that the work continued until about March 4, 1944, which

was some five months after the petition in bankruptcy was filed against Mr. and Mrs. F. T. Newton. There is no proof whatsoever to support this allegation.

III

Paragraph V charges that on the dissolution of the partnership of Newton and Glenn, R. G. Wooton was employed by Mr. and Mrs. F. T. Newton to prepare the required financial data in this transaction, and determine their tax liability resulting therefrom. There is not any testimony before the Referee to sustain this allegation. Any such services would have been included in the bill rendered by R. G. Wooton, September 16, 1943 for $15,000.00, upon which R. G. Wooton received $10,000.00.

IV

Paragraph VI alleges that R. G. Wooton was on or about September 10, 1943 engaged to defend Mr. and Mrs. F. T. Newton against a proposed additional income tax assessment. There is not any proof in the record to support this whatsoever.

V

Allegations of paragraph VII charges that another matter which arose in 1943, but was not exposed as a problem until two years later, was that concerning the liability of Mr. and Mrs. F. T. Newton for withholding and social security taxes in the sum of $225,000.00, reduced to $108,000.00 by R. G. Wooton. The Referee finds that the United States Government filed a petition in the bankruptcy matter before the Referee to enforce as a preference an alleged claim of $225,000.00 against the bankrupts, Mr. and Mrs. F. T. Newton. The Referee also finds that through the efforts of Foster Griffin, an auditor for the Trustee, and representatives of the Department of Internal Revenue, Jackson, Mississippi, the amount of approximately $108,000.00 was arrived at, which amount was accepted by both parties, that is the Collector of Internal Revenue and the Trustee, and that amount of $108,000.00 was paid by the Trustee to the Collector of Internal Revenue, and R. G. Wooton did not have any connections therewith whatsoever.

VI

The Referee finds that there is not any testimony whatsoever to support the allegations in paragraph VIII of the petitioner's petition.

VII

Paragraph IX. The Referee finds that the petitioners failed to offer any competent testimony in support of the allegation in this paragraph. The testimony shows that Mr. and Mrs. F. T. Newton were carrying on business as usual until 16th day of October, 1943. The Referee also finds, as a fact, that sometime about September 16, 1943, R. G. Wooton rendered Mr. and Mrs. F. T. Newton a bill for all services rendered by R. G. Wooton from January 1st, 1943 until September 16, 1943, and subsequent to October 1st, 1943, R. G. Wooton was paid the sum of $10,000.00 by Mr. and Mrs. F. T. Newton.

VIII

Paragraph X of the petition, alleges that in the event any income taxes previously paid should be refunded, R. G. Wooton should have such refund. There is no proof in the record of any such agreement between Mr. and Mrs. F. T. Newton and R. G. Wooton. The proof clearly shows that R. G. Wooton did not perform any services for F. T. and Mrs. F. T. Newton or Newton and Glenn until January 1st, 1943, and that for such services from January 1st, 1943 until September 16, 1943, R. G. Wooton rendered a bill for $15,000.00 and thereafter was paid $10,000.00 by reason of such services. The Referee finds it is not true that R. G. Wooton ascertained the amount of money to be refunded to the bankrupts by reason of over payment of income taxes, known as the carry-back. Upon the other hand, the testimony in the record clearly shows that the amount was ascertained by Mr. Foster Griffin and Mr. Moak, representatives of Respess & Respess, Certified Public Accountants, and that the amount now in controversy includes the amount of refund ascertained by representatives of Respess & Respess and with interest thereon to date of settlement between the

Trustee and the Department of Internal Revenue of the United States.

The Referee also finds that there is no proof in the record of any agreement on the part of Mr. and Mrs. F. T. Newton such as is alleged in Paragraph X of the petition to transfer any part of the income tax refund to R. G. Wooton, but further finds that R. G. Wooton occupied a confidential position with Mr. and Mrs. F. T. Newton as an attorney and certified public accountant, and that in the present proceedings the petitioners rely upon an alleged oral agreement between Mr. and Mrs. F. T. Newton to transfer to R. G. Wooton such funds as might be refunded. The Referee also finds that there is not any evidence in the record to justify any such agreement. While the petitioners do not rely on any written assignment, the record discloses that the petitioners filed suit in the United States Court of Claims at Washington, D. C. under an alleged assignment on the part of Mr. F. T. Newton, dated November 2, 1943, just one day before the petition of involuntary bankruptcy was instituted against Mr. and Mrs. F. T. Newton resulting in their adjudication as bankrupts in August, 1944.

The procedings instituted by the petitioners in the United States Court of Claims was in conflict with the proceedings instituted in this case. In that case they alleged that R. G. Wooton, by reason of his services, had brought about the adjustment of the tax claim of the United States Government against the Newtons' bankruptcy estate from $225,000.00 to approximately $108,000.00, which was paid by the Trustee in Bankruptcy. The testimony undisputedly shows that R. G. Wooton had absolutely nothing to do with the ascertainment of the correct tax or the adjustment which resulted in the United States Government reducing its claim for $225,000.00 to approximately $108,000.00. Such adjustment and settlement was had as the result of the evidence of the certified public accountants of the firm of Respess and Respess, and the representatives of the Department of Internal Revenue, Jackson, Mississippi.

The Referee further finds that if there was any conveyance or assignment or otherwise on the part of Mr. and Mrs. F. T. Newton or either of them to R. G. Wooton, the

same was without consideration, void and unenforceable. The record shows that the Trustee in Bankruptcy has collected in this case $475.000.00; that all of that he has collected was the results of litigation on the part of the creditors of Mr. and Mrs. F. T. Newton, and the Trustee, appointed after the adjudication in bankruptcy; that from and after October 16, 1943, when the United States Government defaulted Mr. and Mrs. F. T. Newton on uncompleted government contracts, they proceeded with diligence to attempt to place beyond the reach of their creditors every asset owned by them; that their concealment began by the conveyance of their valuable real estate to Mrs. Newton's sister, Mrs. J. B. Edmonson, within some sixty days of bankruptcy; they withdrew cash from the bank in the approximate amount of $75,000.00; on December 6, 1943 $10,000.00 worth of property was transferred and delivered to J. B. deVillentroy; they gave to Totten about November 3, 1943 some $10,000.00 to $20,000.00; December 23, 1943, transferring to Dr. Wright, his brother-in-law, Dr. Wright gave Newton a check for $10,000.00; Dr. Wright placing $10,000.00 in currency in the bank to his account; then Newton presented Dr. Wright's check to the bank and received the same $10,000.00. Every dollar recovered for the benefit of the creditors has been the results of litigation. Mr. and Mrs. F. T. Newton never voluntarily made available to their creditors one single dollar; there is no other conclusion the Referee can reach from the evidence in this case, that if any assignment was made or attempted to be made, whether orally or in writing, it was part of a well-devised plan to put their property beyond the reach of their creditors.

The evidence in this case disclosed that after Mr. and Mrs. F. T. Newton were adjudged bankrupts and sub-with the assistance of Honorable T. J. Wills, attorney for the Newtons, went to Washington, D. C. and in the name of Mr. and Mrs. F. T. Newton, propounded before the department at Washington claim for this identical fund which took place long after Respess and Respess, Certified Public Accountants, had ascertained the correct amount of what is known as the carry-back, which is the identical fund involved

in this controversy. The Referee further finds from the undisputed evidence that R. G. Wooton in his life time, and after the appointment of a Trustee, went to the Trustee and endeavored to get the Trustee to consent that he, on behalf of and in the name of the Trustee, present claim for this identical fund provided that he, R. G. Wooton, was reimbursed for his services, which carried the necessary implication that such efforts as R. G. Wooton made, if any, looking to the collection of such funds was on behalf of and for the benefit of the bankrupts' estate.

IX

There is not any evidence in the record whatsoever to support the allegation of this paragraph XII.

X

The Referee finds that while in this proceedings the petitioners do not assert any claim whatsoever under the alleged assignment from Mr. and Mrs. F. T. Newton to R. G. Wooton dated November 2, 1943, but have completely abandoned the same, if any such claim should be asserted in this proceedings; such assignment, if executed at all, was for the purpose as aforesaid; the proof showing that the same was drawn by T. J. Wills, attorney for Mr. and Mrs. F. T. Newton, that the acknowledgment was thereto and was taken by Mr. Wills' secretary; that no one was present but F. T. Newton; that T. J. Wills, attorney for Mr. and Mrs. F. T. Newton, joined as counsel in the petition filed in the United States Court of Claims for collection of this identical money against the United States Government, which claim was denied by the Court of Claims; the petitioners filed Certiorari to the Supreme Court of the United States, which was denied.

XI

The Referee finds that the alleged assignment hereto referred to was executed the day before bankruptcy, if executed at all, and within four months of the filing of the involuntary petition in bankruptcy against Mr. and Mrs. F. T. Newton, and due to the confidential relation between

Mr. and Mrs. F. T. Newton and R. G. Wooton, knew of their insolvency, and such transfer, therefore, would be void as a preference under the Acts of Congress relating to bankruptcy.

XII

The Referee finds that claims were filed by the creditors of Mr. and Mrs. F. T. Newton, approved and allowed in the sum of $2,002,593.62; after paying tax claims and other priorities, a dividend of 12% has been paid to unsecured creditors whose claims have been approved and allowed, and the trustee has on hand a balance at this time of approximately $107,945.15, which includes the funds here in controversy. R. G. Wooton never proved a claim in this estate for any amount.

Conclusions of Law

1

This is a cause over which the Bankruptcy Court has exclusive jurisdiction, by virtue of an order of general reference.

2

The petition fails to state a claim against the defendant upon which relief can be granted.

3

The petitioners and/or said Richard G. Wooton, deceased, failed to prove a claim, if any claim there was which is denied, within the time provided for proving claims against bankruptcy estates. Section 57(n) of the Bankruptcy Act of 1938, (United States Code, Title 11, Chapter 6, Section 83). Failure to comply with the above precludes any independent action as is here asserted.

4

This attempted assignment was a part of the general scheme of the bankrupts to defraud their creditors and because of the existing fraud and which has been so adjudicated by the Courts to reach those beneficially claiming no relief is permitted under the law.

5

Section 203, Title 31, United States Code, annotated, provides that assignments of claims upon or against funds held by the United States are void unless they are freely made and executed in the presence of at least two attesting witnesses after the claim has been allowed and the amount determined and the warrant issued. In this case the void assignment was not attested by two witnesses; the tax claim was unknown and could not have been allowed; the amount could not be ascertained and no warrant for the payment of the claim had issued.

6

The petitioners have already had their day in Court; they elected not to probate the claim in bankruptcy; they elected to file an independent suit in the Court of Claims of the United States in Washington, D. C. in Cause No. 49,010 in said Court. They lost in this effort and on an appeal to the Supreme Court of the United States, Certiorari was denied. The judgment there was final and binding on them and this Court.

7

The petition is without merit; and the petitioners are not entitled to any part of the fund involved in this case, to-wit, $52,858.67, and that the same properly belongs to the bankrupts' estate and an order may be entered accordingly.

(S.) JOHN W. SAVAGE,
Referee in Bankruptcy.